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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 32.

THE GOVERNMENT OF PUERTO RICO, *Petitioner*,

v.

THE SECRETARY OF AGRICULTURE, THE AMERICAN SUGAR REFINING COMPANY, ET AL., *Respondents*.

and

No. 27.

THE SECRETARY OF AGRICULTURE, *Petitioner*,

v.

THE GOVERNMENT OF PUERTO RICO, CENTRAL ROIG REFINING COMPANY, WESTERN SUGAR REFINING COMPANY, ET AL., *Respondents*.

Reply Brief for the Government of Puerto Rico, Petitioner in No. 32, Respondent in No. 27.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

An extended reply to the briefs presented by the Secretary of Agriculture and by the Coast Refiners seems unnecessary. A few paragraphs will suffice to focus issues, to hedge off the irrelevant, to refer cited holdings to their context, and to impose precision upon the wandering lines of the adverse argument.

I. *Texture of the Argument.*—A few sentences, with scant yet typical examples, are enough to reveal the texture of the adverse arguments.

1. *Question.* The arguments of the Secretary and of the Coast Refiners are not addressed to the question presented by the Government of Puerto Rico. That question is whether or not the accused section is authorized by the Constitution. Ours is, in all its branches, a responsible government of limited powers; and each exercise of power demands its specific warrant. The violation of the due process clause of the Fifth Amendment is only a single facet of our constitutional argument.

2. *Irrelevant Matter.* The briefs, particularly that of the Coast Refiners, contain much irrelevant matter. Thus an excursion is invited into the federal and territorial income taxes as they affect citizens of Puerto Rico. The material for an understanding of that matter is not in the statutes, federal and insular. Puerto Ricans do pay income taxes, both personal and corporate, at rates substantially equivalent to federal rates. The matter is not in issue here. Such numerous excursions into irrelevance speak for themselves.

3. *Begging the Question.* The briefs, especially that of the Coast Refiners, are beset with the vice of begging the question. It does not dispose of the issue to cite *Mulford* v. *Smith*, 307 U. S. 38 and *Nebbia* v. *New York*, 291 U. S. 502 to the effect that the Congress is free "to adopt whatever economic policy may reasonably be deemed to promote public welfare"—when the issue is the reasonableness of the accused section. Nor will it do to cite *U. S.* v. *F. W. Darby Lumber Co.*, 312 U. S. 100, to the effect that "the judicial cannot prescribe to the legislative department . . . limitations upon the exercise of its acknowledged power"—when the very question before the Court is whether the power in question should be acknowledged. See Brief of Coast Refiners, pp. 15, 20, 25; Secretary's Brief, p. 84.

Nor will it do to insist that new passengers must not board a train in which all seats have been sold and thus impede the rights to which the sitting passengers are legally entitled—when the very question at issue is the legal rights of the sitting passengers. (Br., C. Refr., p. 18) The adverse arguments are replete with such question-begging.

4. *Resort to Categories.* The adverse briefs, especially when the going is hard, attempt to avoid the specific issues presented by the instant case by resort to over-general categories. Thus an attempt is made to answer questions without ever stating them, through the device of calling Puerto Rico an "unincorporated territory" or even a "possession" of the United States. For calling Puerto Rico a "possession" there is no excuse in fact or in law. The distinction between "incorporated" and "unincorporated" was invented in *Downes* v. *Bidwell*, 182 U. S. 244, as a salutory legal device to avoid forcing the provisions of our Constitution on a people habituated to the civil law when they had not attained that stage of economic development essential to the assumption of the full obligations of American citizenship. Although dicta have gone astray, it has at the hands of careful judges, been limited to matters of revenue. It was vigorously urged upon, and rejected by the Supreme Court in *People of Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253. There a unanimous court held that as general terms "incorporated" and "unincorporated" were without legal significance; that they had meaning only in the context of the acts being passed in review. In respect to the only two matters which are vital here, Puerto Rico is fully incorporated. For the citizens of Puerto Rico have been completely merged into the people of the United States and Puerto Rico is fully included within the tariff wall of the United States. The law does not decide concrete cases by reference to over-general categories. In like manner the Coast Refiners, throughout their brief, rely upon a general and evasive power of regulation vested in the Congress. Thus, if the Congress has power

to impose upon raw sugar an equitable system of control, it follows that it has power to impose upon refined sugar an inequitable system. In a word, it is argued that the reasonable exercise of power in one area of the economy validates its irresponsible exercise in another area. In like manner the briefs neglect entirely the circumstances of the cases cited and the exact status of the territory involved at the time of decision. We insist the specific issues raised here must be met in terms of the present status of Puerto Rico in our federal union.

5. *Retreat to Rhetoric.* Where the going is hard, the adverse parties tend to retreat to rhetoric. Thus, to escape the issue, national security is invoked. The Congress has decreed that a substantial part of our sugar shall come from off-shore. Section 207(b) in no wise affects the proportion of off-shore to mainland. It merely prescribes the form in which the sugar is to be marketed. For what it is worth, the war argument runs against the accused section; for refined sugar takes less shipping space than raw. Let Puerto Rico be attacked by a foreign power and note how quickly it is resolved that the sovereignty of the United States has been invaded. It is needless to cite other examples of the retreat to rhetoric; they are obvious.

II. *The Instant Case in Focus.*—A few sentences ought to be enough to restore the instant case to focus. It is, of note that in spite of excursions by the adverse parties—

1. It has no concern with foreign commerce. Sections 207(d) and 207(e), imposing limitations upon the amounts of refined sugar which may be brought into our continental market from the Philippines and from Cuba, raise such a question: Section 207(b), applying to Puerto Rico, does not.

2. No issue of the power of the Congress to enact a program of farm relief or by appropriate measures to abate the distress of an agricultural or an extractive industry is here in question.

3. It is a matter of course, that in our modern industrial society a scheme for the control of an industry can neither be formulated or applied with a standard which is precise. We fully recognize the necessity of departures from uniformity.

4. There is here no challenge to the power of the Congress to decree economic policy. The decision to leave the sugar producing industry unregulated, to employ the tariff as a system of industrial control, to set up a system of regulation all complete with allocations and processing taxes, or to seek some other way out of industrial distress belongs to the legislature.

5. There is here no issue of the validity of a quota system for refined sugar. As has been shown in our original brief, such a system lies outside the rationale which thus far has been used to sustain regulatory systems in the agricultural and extractive industries, marked by over-capacity and an unorganized multitude of producers. The point is that in the Act the Congress has set up no quota system for refined.

6. No issue of substantive due process is raised here. No question of policy is presented to this Court. This Court is not called upon to amend or to revise any Act; to decree or to outlaw any scheme of control; to bar from, or to bring into public policy, any value or scheme of values.

7. In a word, all the case is concerned with is a procedural issue. In whatever policy the Congress chooses, in whatever scheme of regulation it sets up, it has no authority from the constitution to weave gross discrimination into the legislative web, or to select a single group as an object of its disfavor, or to arrest the development of an American body politic, to the end of conferring special favors upon a privileged group, and of vesting it with proprietary rights in the market.

III. *The Accused Section and the Tariff.*—As briefs have been exchanged and the instant case has taken its way from the Secretary to this Court, the legal battle line has been shifting. The shift has been caused by the persistent attempt by the Secretary and by the Coast Refiners to discover a firm legal foundation for an irresponsible power in the Congress to deal with Puerto Rico in a way which both admit would be invalid in respect to a state—and the citizens of a state—in the union. It is unnecessary to review the changing front which has attended the progress of the case. Here it is enough to cite the three arguments which currently make up the cult of irresponsibility.

1. The first seeks to evade the question of the validity of the accused section. To that end the Secretary in the court below—now joined by the Coast Refiners—argues that Section 207(b) is an integral and inseparable part of the Act. That contention has been met in our original brief—no repetition here is needed. Central Roig and Western point out that it was no part of the farm relief bill proposed by the administration. (Br. pp. 21 ff) The Coast Refiners insist that the Act contains no severability clause and immediately deny ttheir own contention by pointing out that Section 207(g), segregating the refined from the general sugar provisions, is itself a severance clause. (Br. pp. 29-30) The plain truth is that the general provisions in respect to sugar constitute a farm relief measure of the current model while the provisions of Section 207 are a throwback to the Old Colonial System. The accused section does not belong to the same Act; it does not belong to the same century.

2. The second is to substitute another issue for that which the Government of Puerto Rico has raised. The Secretary has frankly admitted that the accused section serves a private interest; that it was passed by the Congress for the benefit of the mainland refiners. (Br. pp. 69). The Coast Refiners elaborate this theme. They were here first; they

have an excess of capacity; the accused section lawfully vests them with a proprietary right to refine for the continental market all cane sugars grown off-shore save for the small driblets allowed to the off-shore territories. (Br. 17 ff) This theme of proscriptive right, which runs through the entire argument, stems from feudal law and is alien to our whole legal system.

3. The third, and principal devise, to save the accused section by endowing the Congress with irresponsible power, is to put Puerto Rico outside the United States and yet to hold it under the dominion of the Congress. This is accomplished by two acts of faith and a sequence of "therefores." The first act of faith is that Puerto Rico is—or is to be treated "as if" it were—a foreign country. This ignores the Foraker and the Organic Acts as amended, the fact that the body politic legally known as the People of Puerto Rico is a community of American citizens and the fact that Puerto Rico and the continental United States are surrounded by the same tariff wall. The second act of faith is that the accused section is—or at least is to be treated "as if" it were—a tariff for the protection of American industry. This overlooks the fact that Puerto Rican industry is United States industry. The "therefores" may possibly be compelling "therefores," but the questions concerned with the march of argument do not have to be faced until the validity of the two acts of faith is established.

(a) The accused section is not a tariff measure. It does not, and was never intended to, raise revenue. Nor has it anything to do with what goods come into the continental market. Its sole concern is with the stage of production at which legally they may be brought into the continental segment of the national economy.

(b) Refined sugar from an off-shore territory is not an "import" into the United States, but a commodity brought into the economic area of the United States known as the continental market. This difference between political state

and continental market presents a problem which neither the Secretary nor the Coast Refiners even attempt to meet.

(c) The word "import" presents an additional difficulty. It could be used with propriety in respect to products from the Philippines, for its people were never American citizens and it has not been included within our customs union. But to say the Philippines, therefore Puerto Rico, is to ignore the very different status of each in the federal union called the United States of America. These differences we have shown to be not only substantial but also fundamental; and there is not one word in either brief to indicate that these differences do not make a distinction. Even if Puerto Rico was for the purpose made alien soil, the argument could not be made to run. For Hawaii in every respect has long since been incorporated into the United States. And to make the argument valid, the refined sugar that comes into the continental market from a domestic source would have to be called an import. There is no escape from the fact that the refined sugar from off-shore enters a specified area of the national economy, not the political state known as the United States.

(d) Even if, to make the tariff argument go, Puerto Rico is to be called a foreign country, it will not make it so. The Congress has the power to regulate commerce with a foreign country as it pleases; but the foreign country has the power to strike back. The validity of the accused section—if it should be declared valid—would confer upon Puerto Rico no power to exclude, or even to tax, goods coming to the island from the mainland. Puerto Rico will remain domestic territory in its lack of power to pass retaliatory measures.

(e) An even more severe challenge will have to be met. For Puerto Rico has been incorporated within the customs union of the United States, is enclosed within the same tariff wall, and has the protection of a mandate to the effect that as between island and mainland merchandise is

to move tariff-free and that no export duties are to be collected on goods coming to the mainland from Puerto Rico. 31 Stat. 77, 41 Stat. 1094.

It is easy to continue this list of questions. But enough has been set down to indicate the facts, the statutes, the stubborn hazards and problems which lie in the way of the acceptance of the tax-tariff theory of Section 207(b). These and like difficulties are not surmounted by the Secretary and the Coast Refiners; they are not even recognized.

IV. The Public Interest.—The interest of the public and of the consumer are in no wise served by the accused section. It is admitted by the Secretary that the island processers can refine sugar the more economically. A thread which runs through the whole of the brief for the Coast Refiners is a fear of the competition of the more efficient insular refiners. There is nothing in the record on the state of the art of refining sugar as practiced on the mainland. But it is a matter of common knowledge that the guarantee of a monopoly to a small compact group of producers does not provide the ideal situation for the elimination of waste and the advance of technology. The refining of beet sugar has been reduced to a single continous process; the accused section closes the door to a similar advance in respect to cane. It is un-American to preserve that which is obsolete. To strike down the accused section is not to strip the coast refiners of their market. It is to force them to make good if they are to hold it. The Constitution contains no injunction against progress.

The question of Puerto Rico's lack of access to the federal political process is met by neither adverse party. The Secretary is silent; the Coast Refiners would meet it by also closing the door to the courts. The Coast Refiners frankly regard citizens of the United States living in Puerto Rico as a subject people to be exploited to the benefit of mainland interest. Article 73 of the Charter of the United Nations, an agreement with other countries properly ratified by the Senate of the United States provides that "Mem-

bers of the United Nations which have or assume responsibility for the administration of territory whose peoples have not attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace that security established by the present Charter, the well-being of the inhabitants of these territories . . ." This article restates obligations assumed by the Treaty of Paris, contains a series of concrete provisions which implement its general principle, and was enacted subsequent to the accused section. Above all, the Constitution, neither by explicit grant nor by implication, confers upon the Congress power to create an empire of colonies.

CONCLUSION.

The question of whether the Congress is authorized by the Constitution to enact the accused section should be directly met and decided.

Respectfully submitted,

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